86-168

Supreme Court, U.S.
FILED
AUG 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

D.R. MERTENS, INC., Apellant,

v.

STATE OF FLORIDA, EX. REL.,
DEPARTMENT OF INSURANCE, Appellee.

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION TO DISMISS APPEAL

CHESTER G. SENF
Post Office Box 110
Tallahassee, FL 32302
(904)488-7973
Counsel for Appellee

August 12, 1986

MOTION TO DISMISS
QUESTIONS PRESENTED

1. THE STATE JUDGMENT RESTS ON AN ADEQUATE, INDEPENDENT, NON-FEDERAL BASIS. THE TERMS OF MERTENS' AGENCY CONTRACT PRECLUDED ANY RECOVERY FOR CONTINGENT COMMISSIONS SINCE IT PRESUMED THE CONTINUED EXISTENCE OF THE COMPANY.

2. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION. THE TERMINATION OF A CONTRACT BETWEEN AN AGENT AND AN INSOLVENT INSURER BY OPERATION OF LAW, PURSUANT TO A STATUTE IN EFFECT PRIOR TO THE EXISTENCE OF A CONTRACT, IS NOT A BREACH OF CONTRACT; IS NOT A TAKING OF PROPERTY OF THE AGENT AND IS NOT AN IMPAIRMENT OF THE CONTRACT AS PROHIBITED BY THE U.S. CONSTITUTION, ARTICLE I, SECTION 10.

PARTIES AND PRELIMINARY STATEMENT

The Appellant, D.R. Mertens, Inc. will be referred to throughout as "Mertens". The Appellee, the Florida Department of Insurance as Receiver of Florida Home Insurance Company will be referred to throughout as "Receiver". References indicated by (A-) indicate the page number in the attached Appendix.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES AND PRELIMINARY STATEMENT.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURSIDICTIONAL STATEMENT.....1

CONSTITUTIONAL PROVISIONS AND STATUTES.....2

STATEMENT OF THE CASE.....5

REASONS FOR DENYING JURISDICTION.....12

No. 1.....12

No. 2.....16

CONCLUSION.....20

CERTIFICATE OF SERVICE.....20

APPENDIX

a. Final Order on Claim of D. R. Mertens; Circuit Court, Leon County, Florida...A-1

b. Order Denying Motion for Reconsideration, Circuit Court, Leon County, Florida...A-8

c. Opinion, District Court of Appeal, First District, Florida.....A-10

d. Order Denying Motion for Rehearing, District Court of Appeal, First District, Florida.....A-27

e. Order Denying Jurisdiction, Supreme Court, Florida.....A-28

TABLE OF AUTHORITIES

Cases Page

Ballesteros v. New Jersey Property Liability Insurance Guaranty Assn., 530 F. Supp. 1367 (1982), affd. 696 F.2d. 980 (3d Cir. 1982).....19

Barrows v. Jackson, 346 U.S. 249, 260, 73 S.Ct. 1031, 1037, 97 L.Ed. 1586.....18

Black v. Cutter Laboratories, 351 U.S. 202, 76 S.Ct. 824, 100 L.Ed. 1188, reh. den, 352 U.S. 859, 77 S.Ct. 21, 1 L.Ed 2d 69.....16

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed. 2d 439.....16

Krug v. Schwarzentraub, 19 N.E. 2d 214 (Ill. 3d DCA 1939).....20

Layton v. Illinois Life Insurance Company, 81 F.2d 600 (7th Cir. 1936) cert. den. 298 U.S.681, 56 S.Ct. 949, 80 L.Ed. 1401.....14, 19, 20

D.R. Mertens, Inc., v. State of Florida, ex rel., Department of Insurance, 478 So.2d 1132 1st DCA 1985) cert. den 488 So.2d 829 (Fla. 1986).....1

Springer v. Colburn, 162 So.2d 513 (fla. 1964).....14

Thatcher v. H.C. Baldwin Agency, Inc., 283 F.2d 857 (1960).....20

OTHER AUTHORITIES:

UNITED STATES CONSTITUTION

Article I, Section 10.....2

Amendment V.....2

Amendment XIV, Section 1

STATUTES

Section 631.291(4)(b), Florida Statutes (1975).....4, 17

OPINIONS BELOW

The memorandum opinion of the Supreme Court of Florida is reported in 488 So.2d 829 (Fla. 1986) denying certiorari (A-28).

The opinion of the District Court of Appeal of Florida, for the First District, is reported in 478 So.2d 1132 (Fla. 1st DCA 1985) (A-8).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 16, 1986.

A Notice of Appeal to this Court was filed in the Supreme Court of Florida on June 13, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Art. I, Section 10

No State shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of atainder, ex post facto law, or law impairing the obligation of contract, or grant any title of nobility.

U.S. Const. Amend. V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be

subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

Section 631.291(4)(b), Florida Statutes (1975)

Nothing in this subsection shall be deemed to extinguish or limit any right the Receiver may otherwise have to cancel any contract or part thereof by virtue of any contractual provision or law of this State. It is the duty of every claimant under this subsection to mitigate and minimize any damage suffered as a result of a breach of contract upon entry of the Order of Liquidation. Recovery by any claimant under this subsection is limited to the actual damages suffered by virtue of a breach.

History: Sec. 745, Ch 59-205, Secs. 13, 35, ch 69-106, Sec. 14, Ch 70-27; now codified at Sec. 631.192(2)(b) (1985).

STATEMENT OF THE CASE

D. R. Mertens, Inc., hereafter "Mertens", entered into an agency contract with the Florida Home Insurance Company in December, 1975. Paragraph 5 of the agreement provided in essence that Mertens could appoint agents to write, solicit, and sell mobile home insurance for the company and Mertens would receive a commission on all business produced by Mertens' agents and accepted by the company, subject to a formula regarding the loss ratios. Paragraph 18 of the agreement, provided that if the agreement was cancelled by either party, for any reason, Mertens would continued to receive commissions computed under paragraph 5 of the agreement for five years after cancellation.

On October 12, 1978, the Circuit Court of Leon County, Florida, entered an Order seizing the Florida Home Insurance Company and enjoined any further transaction of business. Since the entry of the Order, Mertens' agents have produced no business for the company and the company has written no new or renewal insurance business.

On December 12, 1978 the Department of Insurance was appointed Receiver of the Florida Home Insurance Company and, finally, on March 7, 1979 an Order of Liquidation was entered against the company.

The Receiver determined that it would be in the best interest of the policyholders and less costly to the estate to cede the policies to another company rather than cancel the policies and return the unearned

premium to the policyholders. The Receiver was unable to find a licensed company willing to accept the mobile home business on a continuing basis and the policies were ceded to the Protective Indemnity Insurance Company solely for the purpose of continuing coverage until the normal expiration thereof. All of the policies expired or were cancelled by the insureds on or before October 12, 1979.

Mertens filed a claim as a general creditor in the amount of $358,825.18. The Receiver evaluated the claim and recommended payment of $64,236.63 as actual damages, representing earned but unpaid commissions for the calendar years 1977 and 1978. The remainder of the claim was for contingent commissions for the next five years if the company had remained in business and if Mertens' agents had

continued to produce business for the company. The Receiver rejected this claim as conjectural damages which were not allowed by Section 631.291(4)(b), Florida Statutes (1975) which limits the payment of claims to actual damages.

By Order dated June 28, 1984 the Circuit Court of Leon County awarded $64,236.63 recommended by the Receiver for the earned but unpaid commissions for the years 1977 and 1978 (A-5). The Court rejected Mertens claim of contingent commissions for the five years subsequent to the date of the liquidation, finding that "not only are such claims not authorized by Statute, but are dehors the clear language of the contract upon which they are found" (A-4). The Court further found that the contract between Mertens and the company did

not contemplate hypothetical or conjectural commissions. The Court did not rule upon the constitutionality of the Statute.

Mertens' Motion for Reconsideration was denied (A-8) and Mertens appealed to the District Court of Appeal, First District of Florida.

The opinion of the First District Court of Appeal thoroughly examined the relevant portions of Mertens' agency conract. (A-11) The District Court of Appeal affirmed the decision of the lower court, specifically finding that the Receiver did not adopt Mertens' executory agency contract with the company and further finding that, even if the contract had been adopted by the Receiver, the agents right to commissions on renewal premiums was conditioned upon the continued existence of the company and

the continued collection of premiums. The appointment of a Receiver amounted to termination of the contract by operation of law reasonably within the contemplation of the parties and is not an actionable breach.

Almost as an after-thought, the last paragraph of the Opinion held that there was no impairment of contract contrary to the constitutional prohibition, since all relevant provisions of Chapter 631 were in effect at the time Mertens entered into his agency contract (A-25).

Motion for rehearing was denied (A-27) and Mertens applied to the Supreme Court of Florida for discretionary review. The Florida Supreme Court refused to accept jurisdiction and refused to entertain a Motion for Rehearing (A-28).

Thereafter, Mertens filed Notice of Appeal to the Supreme Court of the United States pursuant to 28 U.S.C. Section 1257(2).

REASONS FOR DENYING JURISDICTION

1. THE STATE JUDGMENT RESTS ON AN ADEQUATE, INDEPENDENT, NON-FEDERAL BASIS. THE TERMS OF MERTENS' AGENCY CONTRACT PRECLUDED ANY RECOVERY FOR CONTINGENT COMMISSIONS SINCE IT PRESUMED THE CONTINUED EXISTENCE OF THE COMPANY.

In its final order on Mertens' claim (A-1) the trial court did not address any constitutional issue or the issue regarding the termination of the contract by operation of law. There was no need to address these issues since, even if the contract had not been terminated by operation of law and even if the contract had been adopted or ratified by the Receiver, the very terms of the contract precluded any recovery of contingent commissions for the five years subsequent to the liquidation of the

company. There was no need to address the termination of the contract by operation of law, the possible adoption of the contract by the Receiver or any constitutional issues, since the issues were now irrelevant.

Nevertheless, Mertens again raised these issues in his appeal to the First District Court of Appeal. In its decision, the District Court of Appeal expressly re-examined the terms of Mertens' agency contract and incorporated the relevant portions in its opinion (A-12). The Court then affirmed the lower Court's opinion that since Mertens' agents had produced no new business and that the company had written no business since its seizure, there could be no claim for contingent commissions for the five years following the date of liquidation.

The Court then explained that agency contracts ordinarily imply the agent's right to renewal commissions is conditioned upon the insurance company's continued operation and business, citing Layton v. Illinois Life Insurance Co., 81 F.2d 600 (7th Cir. 1936), cert. den. 298 U.S. 681, 56 S.Ct. 949, 80 L.Ed. 1401 (1936). Then, almost as an afterthought, the Court touched upon Appellant's argument regarding impairment of contract, by stating that since all relevant provisions of Chapter 631 were in effect at the time of the contract formation, by operation of law such provisions became part of the contract. Citing Springer v. Colburn, 162 So.2d 513 (Fla. 1964) (A-25).

Thus, even if the contract had been ratified by the Receiver, Mertens was not entitled to any contingent

commissions for the five years after the Order of Liquidation, since the contingent commissions were based upon actual business written by his sub-agents and accepted by the company. There was no obligation on the part of the company to continue writing mobile home business and, after the Order of Liquidation, it was prohibited from doing so. No new or renewal business was written and all policies lapsed or were cancelled by the insureds during 1979. The decision was based solely upon the clear meaning of the agency contract and all other issues were irrelevant when that contract presumed the continued viability of the company.

Where, as in the instant case, the judgment of the state court rests on two grounds, one state, the other federal, jurisdiction fails if the

non-federal ground is adequate to support the judgment. Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed. 2d 439. The U.S. Supreme Court should not pass on a federal question barely discussed in the opinion of the State Supreme Court, where it appears that the judgment rests on adequate State grounds. Black v. Cutter Laboratories, 351 U.S. 202, 76 S.Ct. 824, 100 L.Ed. 1188, reh. den. 352 U.S. 859, 77 S.Ct. 21, 1 L.Ed. 2d 69.

2. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION. THE TERMINATION OF A CONTRACT BETWEEN AN AGENT AND AN INSOLVENT INSURER BY OPERATION OF LAW, PURSUANT TO A STATUTE IN EFFECT PRIOR TO THE EXISTENCE OF A CONTRACT, IS NOT A BREACH OF CONTRACT; IS NOT A TAKING OF

PROPERTY OF THE AGENT AND IS NOT AN IMPAIRMENT OF THE CONTRACT AS PROHIBITED BY THE U.S. CONSTITUTION, ARTICLE I, SECTION 10.

The constitutionality of Section 631.291(4)(b), Florida Statutes (1975), was totally irrelevant to the opinion reached in the Mertens' decision. Even if the Section would have been declared unconstitutional, the decision denying Mertens' claim for hypothetical and conjectural commissions would have remained the same.

Mertens allegation that Section 631.291(4)(b), Florida Statutes (1975), creates an impairment of contract prohibited by the U.S. Constitution is not only insubstantial, but completely devoid of foundation. The Supreme Court has no jurisdiction to review a judgment of a

State Court when such jurisdiction was based upon an alleged impairment of a contract by reason of the construction of a particular statute in existence when the contract was entered into.

The prohibition against impairment of contractual obligations affords no protection against judicial action, as occurred in the instant case, where the Court did not authorize ratification of the agency contract. The Constitution merely protects against the enactment of legislation which interferes with existing contract rights. Barrows v. Jackson, 346 U.S. 249, 260, 73 S.Ct. 1031, 1037, 97 L.Ed. 1586. Here, not only was the contract formed after the legislation was enacted, but the act about which the Plaintiff complains was an act of the judiciary and, therefore, not within the purview of the contracts

clause. Ballesteros v. New Jersey Property Liability Insurance Guaranty Association, 530 F.Supp. 1367 (1982), affd. 696 F.2d 980 (3rd Cir. 1982).

Mertens' argument that the termination of the contract by operation of law amounted to a breach by the Receiver or a taking by the State is equally without basis. The Florida First District opinion (A-20) relied upon Layton v. Illinois Life Insurance Co., 81 F.2d 600 (7th Cir. 1936) cert. den. 298 U.S. 681, 56 S.Ct. 949, 80 L.Ed. 1401, when it held that it was within the reasonable contemplation of the parties that the agent's right to renewal commissions was subject to the continued existence of the company and the continued collection of premiums. Further quoting from the 7th Circuit opinion:

> ...When the District Court assumed jurisdiction over the affairs of the company and appointed a Receiver, we think this amounted to a termination of the contract by operation of law reasonably within the contemplation of parties and not an actionable breach on the part of the company.

81 F.2d at 602.

The concept that an agent's contract for contingent commissions requires the continued existence of the company and is terminated by operation of law upon liquidation of the company is neither new nor novel and has been adopted by virtually all States. See Krug v. Schwarzentraub, 19 N.E. 2d 214 (Ill. 3rd. D.C.A. 1939) and Thatcher v. H.C. Baldwin Agency, Inc., 283 F.2d 857 (1960).

CONCLUSION

For these reasons, the Court should deny jurisdiction and affirm the

decision of the Florida Supreme Court.

Respectfully submitted,

CHESTER G. SENF
Counsel for Appellee
Post Office Box 110
Tallahassee, Florida 32302
Telephone No.: 904/488-7973

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Motion and Appendix were served on Kenneth Muszynski, Counsel of Record for the Appellant, by mailing the same to him by regular U.S. Mail at Suite 210, 1020 East Lafayette Street, Tallahassee, Florida, 32301, this _____ day of August, 1986.

CHESTER G. SENF
Counsel for Appellee
Post Office Box 110
Tallahassee, Florida 32302
Telephone No.: 904/488-7973

APPENDIX

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLOIRDA

CASE NO.: 79-532

STATE OF FLORIDA, ex rel., The Department of Insurance of the State of Florida,

Relator,

vs.

FLORIDA HOME INSURANCE COMPANY, a Florida corporation authorized to transact an insurance business in Florida,

Respondent.

FINAL ORDER ON CLAIM OF D. R. MERTENS, INC.

This cause came on to be heard upon Receiver's Motion to Determine the Validity of Mertens' Objection to Receivers Final Report, and the Court having heard testimony of witnesses, reviewed evidence and argument and memoranda of counsel and being otherwise advised in the premises finds, as follows:

In December, 1975, D. R. Mertens entered into an agency agreement with Respondent insurance company which provided in essence that Mertens could appoint agents to write mobile home insurance. Mertens would receive a commission on all business produced by his agents and accepted by Respondent company. Paragraph 18 of the agreement provided that if the agreement is cancelled by either party, for any reason, Mertens would continue to receive his commissions for a period of five additional years on all such insurance produced by his agents and written by the Respondent company.

On October 12, 1978, this Court entered an Order seizing Respondent company and enjoined any further transaction of business. Subsequent to that date, Mertens agents produced

no business for Respondent company and Respondent did not accept or write any new or renewal business. On January 1, 1979, the policies in effect were ceded to Protective Indemnity Insurance Company on a run-off basis until the policies lapsed or were cancelled.

On March 7, 1979, an Order of Liquidation was entered. Section 631.251, F.S. (1975) fixing the rights of credotors as of the date of the Order of Liquidation.

Thereafter, in October, 1979, Mertens filed a claim in the receivership for earned but unpaid commissions for the years 1977 and 1978 in the amount of $64,236.63, interest from January 15, 1978 to December 31, 1979 in the amount of $4,389.79, and for contingent commissions for five years, 1979 through 1983 for commissions

which he presumes would be earned if the Respondent company had remained in business and if the Mertens agents would have continued producing business at the same rate for five subsequent years, which claim was in the amount of $290,198.76.

The Receiver, as an officer of the Court, evaluated Mertens' claims and recommended payment of the earned but unpaid commissions for 1977 and 1978 in the amount of $64,236.63, denying the remainder of the claims. Mertens thereafter filed an objection to Receiver's recommendation and a final hearing was had.

The Court finds, as a matter of law, that Mertens' claim for contingent commissions for the five years subsequent to the date of liquidation is without merit. Not only are such

claims not authorized by statute, but are dehors the clear language of the contract upon which they are found. This contract between Mertens and Respondent company clearly contemplated that contingent commissions were to be based on two factors. First, Mertens agents must produce business and, secondly, the company must accept and write the business produced by Mertens' agents. In the instant case, the agents produced no business after October 12, 1978 and the company wrote no business subsequent to that date. It seems clear that the contract between Mertens and Respondent company did not contemplate hypothetical or conjectural commissions.

The Receiver recommends and the Court concurs that D. R. Mertens, Inc. is entitled to be paid $64,236.63 for

earned but unpaid commissions for the years 1977 and 1978. Mertens claim for interest on these unpaid commissions is approved as to amount but can only be paid by the Receiver if all claims in its class are paid in-full. Otherwise stated, Mertens interest claim must go into the "pot". Whether it and other claims in this class will ultimately be paid in-full or in-part will depend upon on [sic] the amounts available to pay this class of claims.

The premises considered, it is therefore ORDERED and ADJUDGED that the claim of D. R. Mertens, Inc. for earned but unpaid commissions for the years 1977 and 1978 in the amount of $64,236.63 is granted and shall be paid pro-rata in the distribution of the assets of Respondent company.

It is further ORDERED and ADJUDGED that Mertens' claim for contingent commissions is denied.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 28th day of June, 1984.

CHARLES E. MINER, JR.
CIRCUIT JUDGE

Copies to:

Chester G. Senf
Attorney for Receiver

Robert E. Gibson, Esquire

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLOIRDA

CASE NO.: 79-532

STATE OF FLORIDA, ex rel., The Department of Insurance of the State of Florida,

Relator,

vs.

FLORIDA HOME INSURANCE COMPANY, a Florida corporation authorized to transact an insurance business in Florida,

Respondent.

ORDER

The Court having reviewed the Motion For Reconsdieration of Final Order On Claim Of D. R. Mertens, Inc. and the Receiver's response thereto it is

ORDERED and ADJUDGED

That the Motion For Reconsideration of Final Order On Claim of D. R. Mertens, Inc. is denied.

DONE and ORDERED in Chambers, Tallahassee, Leon County, Florida.

DATED this 11th day of October, 1984.

Charles E. Miner, Jr.
Circuit Judge

Copies furnished to:

Chester G. Senf, Esq.
Robert E. Gibson, Esq.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IS FILED.

CASE NO. BD-210

D. R. MERTENS, INC.,

Appellant,

vs.

STATE OF FLORIDA EX REL.
DEPARTMENT OF INSURANCE

Appellee.

Opinion filed November 15, 1985.

An Appeal from the Circuit Court for Leon County.
Charles E. Miner, Jr., Judge

Robert E. Gibson, Tallahassee, for Appellant.

Chester G. Senf, Tallahassee, for Appellee.

ERVIN, J.

Appellant, the agency representative of an insolvent insurance company, appeals a final order approving the receiver's recommendation on the claims of the representative,

recommending payment to appellant for earned but unpaid commissions during the calendar years 1977 and 1978, but denying all claims for commissions allegedly due to the representative pursuant to the representative's contract for commissions with the insolvent insurer after the date of receivership. We affirm.

On December 23, 1975, appellant and the subsequent insolvent insurer, Florida Home Insurance Company (Florida Home), entered into a representative agreement granting appellant Mertens the authority "to solicit and appoint insurance agents for such contracts of insurance covering risks on mobile home insurance coverages and related lines" as Florida Home "has authority lawfully to make". The contract provisions relevant to this appeal

state:

5. CONTINGENT COMMISSIONS:
In addition to advance commissions otherwise payable, the COMPANY hereby agrees to pay the REPRESENTATIVE a contingent commission as respects all policies or premium installments on all classes of mobile home business that the COMPANY has lawful authority to write that are produced by any agents or their successors or assigns originally appointed by REPRESENTATIVE and which shall be computed as follows:

a. If, in any accounting period, the ratio of losses incurred to premium earned on all policies issued by any agents or their successors or assigns originally appointed by REPRESENTATIVE is

1. less than twenty-five percent (25%), the contingent commission due and payable shall be five percent (5%) of the earned premium for the accounting period;

2. Greater than twenty-five percent (25%), then the contingent commission due and payable shall be determined by adding one-fourth (1/4) of one percent (1%) for each point the loss ratio is below forty-five percent (45%). This resulting percentage will be paid on the earned premium for the accounting period;

3. greater than forty-five percent (45%), then there is no contingent commission due for the accounting period.

* * *

12. The provisions of this contingent agreement pertain to all policies issued by any agent or his successors or assigns originally appointed by REPRESENTATIVE whether written under the original agency agreement or a replacement or succeeding agreement or by a subsidiary of the COMPANY or through a "fronting" or reinsurance arrangement with the COMPANY or through a bordereau arrangement or contract with another company.

* * *

18. If this representative agreement between the COMPANY and the REPRESENTATIVE IS cancelled by either party for any reason whatsoever with or without cause, the Contingent Commission portion of this Agreement shall be in full force and effect for five (5) full accounting periods after such cancellation of the contract. The COMPANY shall pay all contingent commissions for a period of five (5) calendar years. At the end of five (5) accounting periods or five (5) calendar years if all monies due the REPRESENTATIVE have been paid, this Agreement shall automatically expire and no further payment by the COMPANY is due or payable to the REPRESENTATIVE.

(e.s.)

On October 12, 1978, an order of seizure was entered pursuant to Section 631.361, Florida Statutes, directing the Department of Insurance (Department) to take possession and control of the financially troubled

insurer's property, books, accounts, bank accounts and premises. Subsequently, on December 11, 1978, the lower court found Florida Home impaired within the meaning of Section 631.011(3) and (4), Florida Statutes, and appointed the Department as receiver of Florida Home for purposes of rehabilitation. Among other things, the receiver was directed to conduct the business of the insurer and to negotiate with insurance companies for the purpose of attempting to have policies of insurance presently in force, assumed or reinsured into an acceptable insurance carrier. The court further provided that all policies of insurance issued by Florida Home would remain in full force and effect until further order of the court. After attempts were unsuccessfully made to

restore Florida Home to a financially solvent condition, the receiver petitioned the court for an order authorizing the receiver to enter into a reinsurance treaty and supplemental agreement with Protective Indemnity Insurance Company of Florida (Protective), which, among other thing, assigned all outstanding mobile home insurance policies of Florida Home, inluding all policies written by agents of appellant, to Protective for the purpose of processing and paying claims, and authorized Protective to service all policies reinsured by it. Protective is not a carrier which insures mobile homes, and the policies in effect as of the date of the order appointing the receiver (December 11, 1978), including those written by appellant's agents, were allowed to lapse, run out and Protective neither

rewrote nor renewed them.

Following a subsequent order of liquidation, notifying all persons having claims against Florida Home to timely file such claims with the receiver, appellant filed a claim for all earned but unpaid commissions for the years 1977 and 1978, and, pursuant to paragraph 18 of its contract with Florida Home, sought additional compensation for renewal commissions over a period of five calendar years thereafter, which, when reduced to present value at six percent as of December 31, 1979, resulted in a total claim of $358,825.18.

Both the receiver and the lower court found that appellant was entitled to his claim for earned but unpaid commissions for the years 1977 and 1978 in the amount of $64,236.63, but, because the evidence showed that

Mertens' agents produced no new business for Florida Home after December 1978, and because Protective did not renew any policies written by Mertens' agents after that date, denied the claim for contingent commissions for the five years following the date of liquidation.

The first two issues raised by Mertens are (1) whether the receiver was burdened with all the obligations associated with the policies, including appellant's agency contract with the insolvent insurer, and (2) whether the receiver anticipatorily breached the contract between appellant and Florida Home Insurance Company by assigning all mobile home insuance policies to an insurer which failed to renew them or otherwise protect appellant's interest in future renewal commissions, as provided for

in its contract with Florida Home. Essentially, Mertens argues that when the Department was appointed as receiver of the assets of Florida Home, it thereby stood in the shoes of Florida Home and necessarily assumed all rights and obligations of the business, including the obligation to pay to the representative contingent commissions for five full accounting periods after the cancellation of the contract.

In answer to appellant's arguments asserted under points I and II, we respond that the law is clear that there can be no breach, anticipatory or otherwise, of an executory contract by a receiver unless the receiver specifically elected to be bound thereby. See Real Estate Marketers, Inc., v. Wheeler, 298 So.2d 481, 483 (Fla. 1st DCA 1974). Moreover, since

the receiver was court-appointed, it needed approval by the court to maintain the contract with appellant. American Automatic Co. v. Harbour Towers Development Corp., 227 So.2d 94, 95 (Fla. 3d DCA 1969). Although the order appointing the Department as receiver for purposes of rehabilitation directs the receiver to maintain in full force all policies of insurance or similar contracts of coverage issued by Florida Home until further order, the order did not grant approval to the receiver to maintain the representative agreement between appellant and Florida Home. Moreover nothing in the record reflects that the receiver elected to be bound by the terms of appellant's contract with Florida Home, even though the receiver had notice of that contract as early as October 31, 1978. Finally, Section

631.291(4)(b), Florida Statutes (1975), grants the receiver the right "to cancel any contract or part thereof by virtue of any contractual provision or law of this state."

The general rule is that insurance agency contracts ordinarily imply that the agent's right to commissions on renewal premiums is conditioned upon the insurance company's continued operation in business. Thus, it is generally recognized that an agent's right to commissions on renewal premiums is lost when the insurance company ceases to do business. See Annot. 36 A.L.R.3d 958, 956-966 (1971). For example, in Layton v. Illinois Life Insurance Co., 81 F.2d 600 (7th Cir.), cert. denied, 298 U.S. 681, 56 S.Ct. 949, 80 L.Ed. 1401 (1936), the court was confronted with the question of whether a life

insurance agent under a contract for post-agency renewal commissions was entitled, upon receivership of the insurance company, to recover the present value of such commissions on renewal premiums which, it was alleged, the company, had it continued in business, would have received in due course. The Seventh Circuit Court of Appeals concluded that the appellant's right to commissions on future premiums was at all times a prospective right that was contingent upon payment being made by the holders of the contracts of insurance, and therefore it was within the reasonable contemplation of the parties that the agent's right to renewal commissions was subject to the continued existence of the company and the continued collection of the premiums:

> The very nature of the agency contract impels the conclusion that

it must have been within the comtemplation of the contracting parties that the company might some day become incapacitated from continuing in the insurance business. When the district court assumed jurisdiction over the affairs of the company and appointed a receiver, we think this amounted to a termination of the contract by operation of law reasonably within the contemplation of the parties and not an actionable breach on the part of the company.

81 F.2d at 602.

We similarly regard the agency contract before us as reasonably implying the continued existence of the insurance company, because the parties must have reasonably contemplated that the continued payment of any such commissions depended upon the actual collection or receipt of the premiums by the company. Paragraph 5 of the contract, pertaining to the agent's right to contingent commissions, bound the company to pay to the representative contingent commissions on all classes of mobile home

business that the company has "lawful authority to write." (e.s.) Obviously if the company is in receivership it no longer retains the lawful authority to issue insurance on mobile homes. See also Myers v. Protective Life Insurance Co., 342 So.2d 772, 777 (Ala. 1977). This position was forcefully reiterated in People ex rel Palmer v. Peoria Life Insurance Co., 376 Ill. 517, 34 N.E.2d 829, 136 A.L.R. 151 (1941), recognizing that contracts of agents necessarily and, as a matter of law, are dependent for their continued existence upon the viability of the insurance company, and that the parties must be conclusively presumed to have entered into the agency contract in contemplation of the future possibility of the company's insolvency and

liquidation under the Illinois Liquidation Act. Consequently, upon the occurrence of such possibility, the agency contract is also necessarily terminated.

The Palmer court also addressed the same argument raised by appellant at bar: that the reinsurer, in taking over the business and assets of the insolvent insurance company, thereby assumed all the burdens of the business, and stood in place of the former company and became liable for all renewal commissions agreed to in the contract. The court observed that the reinsurance contract entered into between the reinsurer and the policy-holders of the insolvent company did not obligate the reinsurer to pay the former agents of the insolvent company any services rendered their former employer.

As to appellant's argument that it was unconstitutionally deprived of its contract rights without payment of full compensation, we respond that insurance agents do not have a vested interest in future premiums against insolvency receivers. Moreover, Mertens can make no valid argument that the actions of the receiver impaired the obligation of his contract, contrary to the constitutional prohibition, since all relevant provisions of Chapter 631 were in effect at the time of the contract's formation under which Mertens seeks contingent renewal commissions. By operation of law, such provisions became part of the contract. See Springer v. Colburn, 162 So.2d 513 (Fla. 1964).

Affirmed.

SHIVERS & JOANOS, JJ. CONCUR.

FOOTNOTE:

Appellant presented an alternative basis for assessing future damages, based on evidence revealing that appellant's average annual income for the 1976-1979 fiscal years was $40,166.00, which, for the five-year period, totaled $200,830.00.

This provision is now codified at Section 631.192(2)(b), Florida Statutes.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32301
Telephone No. (904)488-6152

Date: DECEMBER 18, 1985

Case No BD-210

D. R. MERTENS, INC., Appellant/Petitioner, vs. STATE OF FLORIDA, ex rel., DEPARTMENT OF INSURANCE, Appellee/Respondent

ORDER

Motion for rehearing is DENIED.

By Order of the Court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following: Robert E. Gibson, Esquire, Tallahassee, Florida; Herbert R. Kraft, Esquire, Tallahassee, Florida; Chester G. Senf, Esquire, Tallahassee, Florida.

Karen Roberts, Deputy Clerk

SUPREME COURT OF FLORIDA
Wednesday, April 16, 1986

Case No. 68,188

District Court of Appeal
First District No. BD-210

D. R. MERTENS, INC.,

Petitioner,

vs.

STATE OF FLORIDA EX REL.,
DEPARTMENT OF INSURANCE,

Respondent

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R.

App. P. 9.330(d).

BOYD, C. J., OVERTON, MCDONALD and EHRLICH, J.J., concur ADKINS, J., dissents.

cc: Hon. Raymond E. Rhodes, Clerk
Hon. Paul Hartsfield, Clerk
Hon. Charles E. Miner, Jr., Judge
Kenneth J. Muszynski, Esquire
Chester G. Senf, Jr., Esquire